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In the Supreme Court of the United States.

OCTOBER TERM, 1923.

THE UNITED STATES OF AMERICA, petitioner,
v.
FREDERICK L. MERRIAM. } No. 67.

THE UNITED STATES OF AMERICA, petitioner,
v.
HENRY B. ANDERSON. } No. 68.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

These are actions of law by the United States of America, plaintiff, against Frederick L. Merriam and Henry B. Anderson, defendants, respectively, for the recovery of certain additional income taxes for the year 1915 under the provisions of the Act of October 3, 1913.

The amended complaints allege the following facts:

On May 7, 1915, Alfred G. Vanderbilt died leaving a last will and testament which was duly admitted to probate by the Surrogat's Court of the County of New York on June 16, 1915. In the eleventh paragraph of his will, the testator provided in part as follows (R. 8):

> ELEVENTH.—I give and bequeath to my brother Reginald C. Vanderbilt, Five hundred thousand dollars ($500,000); to my uncle Frederick W. Vanderbilt, Two hundred thousand dollars ($200,000); to Frederick M. Davies, Five hundred thousand dollars ($500,000); to Henry B. Anderson, Two hundred thousand dollars ($200,000); to Frederick L. Merriam, Two hundred and fifty thousand dollars ($250,000); to Charles E. Crocker, Ten thousand dollars ($10,000); and to Howard Lockwood, One thousand dollars ($1,000).

The testator further provided in the sixteenth paragraph of his will (R. 12):

> SIXTEENTH.—I nominate and appoint my brother, Reginald C. Vanderbilt, my uncle, Frederick W. Vanderbilt, Henry B. Anderson, Frederick M. Davies, and Frederick L. Merriam Executors of this my Will and Trustees of the several trusts created by this my Will.
>
> I direct that no bond shall be required in any State or country to qualify my said Executors to act as such or as trustees hereunder.
>
> The bequests herein made to my said Executors are in lieu of all compensation or com-

missions to which they would otherwise be entitled as Executors or Trustees.

Each defendant duly qualified as executor of and trustee under the said last will and testament, and letters testamentary were duly issued to each of them by the said Surrogate's Court on June 16, 1915. During the calendar year 1915 each defendant received the whole sum thus given him in "lieu of all compensation" as Executors and Trustees. Neither defendant, within four months from June 16, 1915, pursuant to the provisions of Section 2753 of the Code of Civil Procedure, renounced said bequest to him, and no commissions were ever allowed or paid to the defendants thereunder.

Pursuant to the requirements of Section II of the Act of October 3, 1913, each defendant filed with the Collector of Internal Revenue a return, purporting to be a true and complete statement of the gains, profits, and income received by or accrued to the defendants, respectively, during the calendar year 1915. Neither defendant included in his return the amount or any part thereof received by him under the will. By reason of such failure to include this sum in his return and to pay a tax thereon, the United States claimed that each defendant was liable for additional income tax for the year 1915 in the following amounts: Frederick L. Merriam, $10,912.26, with interest thereon from June 30, 1916; Henry B. Anderson, $7,754.87, with interest thereon from June 30, 1916.

Demurrers were interposed to each amended complaint upon the ground that neither stated facts

sufficient to constitute a cause of action. The District Court overruled the demurrers and gave the defendants leave to answer over (R. 13–17). The privilege was not availed of and judgment absolute was accordingly entered against each defendant. The significance of this will be discussed in the concluding portion of this argument (*Post*, pp. 35–38). From these judgments writs of error from the Circuit Court of Appeals for the Second Circuit were sued out (R. 20). That court reversed the judgments below, holding that the sums of money in question were payable independently of services and not as compensation (R. 23–28). This Court then allowed writs of certiorari to review those decisions.

The sole question involved is whether the sums of money which were given to the respondents in lieu of the compensation allowed by law constituted taxable income within the meaning of the Act of October 3, 1913.

The petitioner contends that the so-called bequests were compensation to the respondents for personal services rendered by them to the estate of Alfred G. Vanderbilt as executors and trustees, and as such were taxable under the express provisions of the Act.

Respondents contend that the sums so received by them were not taxable income (1) because they were bequests and expressly exempted by the Act, (2) because they were not income within the meaning of the Act and of the Sixteenth Amendment to the Constitution.

THE STATUTE.

The statute involved is Section II of the Act of October 3, 1913 (38 Stat. 114, 166). The pertinent parts thereof are as follows:

> A. Subdivision 1. That there shall be levied, assessed, collected, and paid annually upon the entire net income arising or accruing from all sources in the preceding calendar year to every citizen of the United States, * * * a tax of 1 per centum per annum upon such income * * *.
>
> Subdivision 2. In addition to the income tax provided under this section (herein referred to as the normal income tax) there shall be levied, assessed, and collected upon the net income of every individual an additional income tax [at graduated rates].
>
> * * * * *
>
> B. That, subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include gains, profits, and income derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, businesses, trade, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property, also from interest, rent, dividends, securities, or the transaction of any lawful business carried on for gain or profit, or gains or profits and income derived from any source whatever, including the income from but not the value of property acquired by gift, bequest, devise, or descent * * *.

POINT I.

"Bequest" as well in the terminology of the law as in its general acceptation implies a bounty or gratuity. It is in such sense that "bequest" is used in the Act of October 3, 1913.

The bequests to the respondents of $250,000 and $200,000, respectively, were expressly stated by the testator in his will (R. 12) to be—

> in lieu of all compensation or commissions to which they would otherwise be entitled as executors or trustees.

Despite this fact, it is contended that they nevertheless fall within the provisions of the subparagraph B of Section II of the Act of October 3, 1913, which excludes from taxation "the value of property acquired by gift, bequest, devise, or descent." This contention, we submit, is clearly untenable, both in the light of the authorities and the text of the Act itself.

The word "bequest," both in its usual and in its legal signification, means a gratuity. It presupposes a bounty flowing from the testator to the beneficiary. It is practically synonymous with gift, the only distinction being that a gift results from an act *inter vivos*, and a bequest takes effect at death. Such is the meaning given the term by the dictionaries, by the text writers, and by the courts.

In Webster's Dictionary "gift" is defined as "anything given; anything voluntarily transferred by one person to another without compensation; a

voluntary transfer of real or personal property without any consideration."

The same authority states that the word "bequeath" is "properly applied to a *gift* by will or legacy, i. e., of personal property," and "bequest" as "that which is left by will, especially personal property; a legacy; also a *gift*."

In Bouvier's Law Dictionary "bequest" is defined as "a *gift* by will of personal property." A similar definition is given in Black's Law Dictionary.

In Anderson's Dictionary of Law the following definitions appear: "Bequest: a *gift* of personalty by will; the clause in the instrument making the gift; the thing itself so given."

Similarly Blackstone in his "Commentaries" (Chase's edition, p. 609) defines "legacy" as "a bequest, or *gift*, of goods and chattels by testament."

Schouler in his work on Wills, Executors, and Administrators, in defining "devise" and "bequest" states (5th edition, vol. 1, p. 3) that a "'devise,' properly speaking, is a *gift* of real property by one's last will and testament * * *; 'bequest,' on the other hand, is a *gift* by will of personal property."

See also Heaton on Surrogates' Courts (3rd ed., vol. 2, p. 1283), where the learned author states that:

> A general legacy is a *gift* of personal property by a last will and testament not amounting to a bequest of a particular thing or money, or of a particular fund designated from all others of the same kind.

See also 40 Cyc., 994.

A direction by a testator that his executors should pay an obligation is not a bequest. When a testator directs his executors to pay a creditor, the latter does not receive a bequest. He simply gets his own, and his right to it is independent of the testator's direction. The debts of an estate for administration expenses are none the less debts and do not differ in principle from *ante mortem* debts.

Furthermore, the courts universally refer to bequests as gifts.

> In re *Hoover's Estate*, 7 N. Y. Supp. 283.
> In re *Daly's Estate*, 89 N. Y. Supp. 538.
> *Disston et al.* v. *McClain*, 147 Fed. 114.

In the case of *In re Daly's Estate*, *supra*, the question involved was whether a person who occupied toward the testatrix the relationship of child to parent was entitled to compensation for services out of the estate of the decedent in addition to a devise contained in the will. The Court held the devise to be a gift and the claimant to be entitled to compensation for her services upon proving an understanding or expectation on the part of the decedent to pay therefor, saying at page 541:

> The law seems well settled that a bequest or devise to a creditor is not to be regarded as payment of an indebtedness, unless the will expressly declares, or the surrounding circumstances clearly indicate such an intent on the part of the testatrix. A devise is a *gift* of real property by a last will and testament. * * *

> *A legacy implies a bounty and not a payment.* (Italics ours.)

In the case of *Disston* v. *McClain, supra,* which involved the question of a legacy tax under the Act of 1898, the Court defined a legacy as follows (page 117):

> Legacies and distributive shares are classed together, and as a distributive share is a definite portion in money of the residue of the personal estate of an intestate, so a legacy is a definite *gift by will* of personal property, either general and pecuniary, or specific. (Italics ours.)

Respondents cite the case of *Orton* v. *Orton,* 3 Keyes, 486, in support of their contention that the term "bequest" includes not only gratuities but "things given as a recompense." What the Court decided in that case was that the testator's widow, having accepted a bequest given to her in lieu of dower, was a legatee and, as such, was entitled to share under the terms of the will in a pro rata distribution of the residuary estate along with the other legatees. Having once elected to accept the bequest in lieu of dower, the widow obviously took as a legatee under the will. With that we have no quarrel. The Court's observation as to the legal intendment of the word "legacy" was clearly *dictum.* Exactly contrary is the *decision* in the case of *Reynolds* v. *Robinson,* 82 N. Y. 103. The plaintiff in that action sought to recover for services rendered by his wife to defendant's testator.

Plaintiff's wife was an adopted daughter of defendant's testator and had performed services as a housekeeper for her father after her marriage to the plaintiff. The defense interposed was that under an agreement these services were to be compensated for by gifts to the plaintiff and his wife from the testator in his lifetime and by legacies in his will. The testator in his will, after providing for the payment of his debts, left legacies to plaintiff's wife and daughter in an amount less than the alleged debt. The will contained no provision that the legacies were intended as compensation for the services rendered. The defendant sought to show upon the trial by the testimony of the scrivener who drew the will that at the time it was drawn the testator stated that he had promised to pay plaintiff's wife for her services by will and that he directed the insertion of the legacies to plaintiff's wife and her daughter in order to comply with such promise. In sustaining the exclusion of the testimony, the Court of Appeals said (pp. 106, 107):

> "The only material question of law presented by the record arises upon the exception to the exclusion by the referee of the offer of the appellants to show by the scrivener who drew the will that at the time it was drawn the testator stated that he had promised Mrs. Reynolds to pay her for her services by will, and directed the insertion of the legacies to Mrs. Reynolds and her daughter, giving as a reason for the instruction that it was to comply with such promise. The offer in sub-

stance was to show by the declarations of the testator, made when the will was drawn, that the legacies were intended as a payment for the services in question.

The general rule is that declarations of a testator, before, contemporaneously with, or after the making of a will, are inadmissible to affect its construction (1 Redf. on Wills, 538). In *Mann* v. *Executors of Mann* (1 Johns. Ch. 231), Chancellor Kent said that the rule was well settled that parol evidence can not be admitted to supply or contradict, enlarge or vary the words of a will, nor to explain the intention of the testator, except in two cases, viz, when there is a latent ambiguity arising *dehors* the will as to the person or subject meant to be described, or to rebut a resulting trust. *A legacy implies a bounty and not a payment, and to permit extrinsic evidence of the declaration of the testator to change the material import of the donative words would be to contradict by oral evidence the legal effect of the written instrument, and would violate the policy of the statute of wills,* "for then," as Lord Chancellor Talbot said, in *Fowler* v. *Fowler* (3 P. Wms. 353), "the witnesses, and not the testator, would make the will." (Italics ours.)

The foregoing authorities clearly establish that the word "bequest" in its general as well as in its legal acceptation implies a bounty and not a payment and show beyond peradventure that the term is donative and not compensative in its signification.

It is in such sense that the word is used in the statute as a moment's reflection will show. The word "bequest" is used in the Act immediately after the word "gift" and before the word "descent," and so by the familiar rule of *noscitur a sociis*, it is to be defined as a *gift* by will, quite apart from the fact that such is its ordinary meaning as shown above. It is manifest that Congress used the words "bequest, devise, or descent" to mean property given by will or descending by statutes of distribution or descent as distinguished from property passing for a consideration.

Furthermore, it is provided in the same subparagraph of the Act that "compensation for personal services in whatever form paid" is taxable income within the meaning of the Act. Contrasting the word "bequest" with the words "compensation * * * in whatever form paid" should resolve the doubt if any exists. If what is received is "compensation" even though paid in the form of a bequest by will it is nevertheless taxable income, *a fortiori* when testator expressly characterizes the bequest as compensation. If, however, it is a donative bequest as distinguished from "compensation" it is not taxable income.

The statute manifestly does not exempt from taxation income paid in the form of a bequest. The *entire* net income of the taxpayer is expressly made taxable under Paragraph A of the Act. The words "but not the value of property received by gift, bequest, devise, or descent" constitute, as it were,

legislative signposts for the guidance of the taxpayer for the purpose of pointing out what is not income.

This legislative definition has since been confirmed by the Supreme Court in the cases of *Eisner* v. *Macomber*, 252 U. S. 189, 207, and *Merchants Loan & Trust Co.* v. *Smietanka*, 255 U. S. 509, 518, where it is said "Income may be defined as the gain derived from capital, from labor, or from both combined, *provided it be understood to include profit gained through a sale or conversion of capital assets.*"

Under this definition a bequest in the nature of a gift is not income, whereas compensation for personal services, though in the form of a bequest, is a gain derived from labor and hence income and clearly taxable under the Act. The bequests in the cases at bar, as we shall point out below, constitute compensation to the respondents for their services as executors and trustees under the will of Mr. Vanderbilt. Such compensation is by definition income and taxable under the express words of the statute.

POINT II.

The bequests to the plaintiffs in error "in lieu of all compensation and commissions to which they would otherwise be entitled as executors or trustees" constitute "compensation for personal services" within the meaning of the Act of October 3, 1913, and as such are taxable as income under the Act.

Under the common law, a fiduciary office is honorary and gratuitous. Thus it has long been established in England that executors and trustees are

not entitled to compensation for their services. The rule likewise obtained in New York until changed by statute. This is shown in the case of *Manning* v. *Manning*, 1 Johnson's Ch. 527, decided in 1815, where Chancellor Kent said (p. 532):

> I think it is not to be denied that the law is settled against the claim of a trustee to compensation. * * * the rule applies not to executors merely, but equally to trustees of every description. * * * A trust is regarded, in chancery, as a matter of honor and conscience, and undertaken with humane, or friendly, or charitable, and not with mercenary, views.

Again the Chancellor said (pages 533, 534):

> It appears to be the practice in several of the United States to allow a commission of so much *per centum* to executors and other trustees. * * * But this practice can not be received here as authority, however respectable the source; for it is not founded upon a different construction of the English law, but upon local usages or statutes, which have confessedly changed the English rule.

The legislation referred to in the Chancellor's opinion gradually spread throughout the country and it has long been the policy in most, if not all, of the States of the United States fairly and reasonably to compensate fiduciaries for the services rendered by them. Most of the States have fixed by statute the rates of compensation to be paid, generally upon a per centum basis.

Thus in New York, at the time of decedent's death, compensation to executors and trustees was provided for by Section 2753 of the Code of Civil Procedure.[1] Moreover, in jurisdictions where statutory compensation is provided for, the right of a testator is recognized to fix the compensation of his executor or trustee in an amount equal to, greater, or less than, that fixed by law. (*Ireland* v. *Corse*, 67 N. Y. 343; *Secor* v. *Sentis*, 5 Redfield Surr. 570; *Connolly* v. *Leonard*, 114 Me. 29; *Lennig's Estate*, 53 Pa. Sup. Ct. 596; 24 Corpus Juris, 989.)

At the time letters testamentary were issued to plaintiffs in error it was provided by Section 2753 of the Code of Civil Procedure:

> * * * Where the will provides a specific compensation to an executor, administrator, * * * or trustee, he is not entitled to any allowance for his services, unless by a written instrument filed with the surrogate, within four months from the date of his letters * * * he renounces the specific compensation.

It is conceded (R. 2) that the respondents did not renounce the so-called bequests within the time limited and that no commissions have been allowed or paid to them under the Statute referred to. Thus respondents have construed the bequests as testamentary compensation for their services as executors and trustees. It is quite true that if

[1] It gives each executor or trustee 5% on the first $1,000, 2½% on the next $10,000, and 1% on the balance over $11,000.

the bequests were not compensation, there would have been no necessity for the filing of renunciations. In that event, however, they would have received large sums of money by way of statutory commissions, *but concededly no commissions were paid them.* The reason, of course, is obvious. They were not entitled to commissions—not because by this direction of the testator they were to receive no compensation (*Matter of Vanderbilt*, 68 N. Y. A. D. 27), but because the bequests were given to the executors *as compensation*, and were so recognized by them.

The facts, we submit, admit of no other conclusion.

Aside from the foregoing considerations, there can be no question that under the authorities in this country the amounts received by the respondents under the terms of Mr. Vanderbilt's will constitute compensation for the personal services to be rendered by them to the estate in their capacities of executors and trustees. As the Court below aptly said in its opinion (R. 14):

> There seems to me no question whatever that these legacies in part anyway are "compensation for personal services." When the testator provided that they should be "in lieu of all compensation or commissions to which they would otherwise be entitled as Executors and Trustees," he could only have meant to substitute the legacies in the place of their statutory compensation. If a substitute, the legacies must themselves have been compensation, and since the commissions would certainly have been for "personal services," the substitute itself was the same.

It will be contended, however, that the conclusion, reached by the District Court, that the bequests constitute testamentary compensation, because given in lieu of statutory compensation, does not *necessarily* follow from the premises. In the case of *Orton* v. *Orton*, *supra*, upon which reliance is placed, the Court, as before stated, merely held that a widow taking a bequest in lieu of dower was a legatee and as such entitled to share in the residuary estate under the terms of the testator's will along with the other legatees. Argument is made therefrom that since a bequest in lieu of dower is not dower, therefore a bequest in lieu of statutory compensation is not compensation. The argument, however, is patently fallacious. The words "in lieu of all compensation or commissions," etc., merely mean that the sums specified are given in lieu of the *statutory* compensation or commissions. They effect a substitution of the *amount* of compensation fixed by the will for the *amount* of compensation allowed by Statute.

In the case of *Matter of Tilden*, 44 Hun, 441, the question before the Court was whether the executors who in a previous accounting had been allowed full compensation provided for in the will should in a subsequent accounting be allowed additional compensation for services rendered. The testamentary provisions in question read (p. 443):

> In lieu and exclusion of all other commissions and compensation to my executors for performing their duties under this will, and in addition to their actual and necessary dis-

> bursements and expenses, I authorize them to receive from my estate the following commissions, * * * such commissions to be in full for such services, and the amount to be divided among my executors, from time to time, equitably, in proportion to their respective services.

The Court held that this language provided for compensation and not for a gratuity, and, in modifying the order of the Surrogate, said (at p. 444):

> The learned surrogate has based his decision in reference to this matter upon the ground that this compensation provided for in the will in excess of that allowed by law, is looked upon as a legacy, and a legacy is not discharged until paid. But it does not seem to us that this is a correct view. The provisions in the will were intended to be as compensation for services rendered, *to be in no respect a gift*, but an authority to charge for their services a certain sum. (Italics ours.)

This case was approved and followed in the case of *Richardson* v. *Richardson*, 129 N. Y. Supp. 941, in which the Court said (pp. 943, 944):

> As was said in *Matter of Tilden*, 44 Hun, 441, 444, in which the Surrogate's Court had held that a similar compensation provided in a will, in excess of that allowed by law, was not a legacy: "The provisions in the will were intended to be as *compensation for services rendered, to be in no respect a gift*, but an authority to charge for their services a certain sum."

> *The compensation provided by the will is not a legacy, and does not abate with the legacies,* but is compensation, carefully determined by the testator and directed to be paid for the services to be rendered, and is therefore to be paid in full. (Italics ours.)

In *Matter of Accounting of Mason*, 98 N. Y. 527, the testatrix bequeathed her residuary estate to her executors. The claim was made that the bequest was given as compensation for the services the executors should render in their representative capacity. As the will contained no provision to that effect, the Court properly overruled the contention, saying (p. 533):

> The nineteenth clause of the will is as follows: "All the rest, residue, and remainder of my estate, real and personal, not hereinbefore disposed of, I give, devise, and bequeath unto my friends Alonzo Wynkoop, Bradley Wynkoop and Francis O. Mason, who are hereinafter mentioned as the executors of this my will, in equal shares." The claim is made on behalf of the appellants that this bequest was made to the executors as a compensation for the services which they should render in administering upon the estate. This bequest was not intended for the specific compensation mentioned in Section 2737 of the Code. There is no language in the will indicating that it was meant to be *in lieu of commissions.* If these executors had renounced before letters were issued, they would have been entitled to receive this bequest; and if one of them, at

> any time after qualification, had resigned and been discharged, it would not have interfered with his right to take his share in the bequest. The right of the residuary legatees to take under the residuary clause did not depend upon their acting and rendering services as executors; but the bequest to them was a bounty which they were entitled to receive as if they had no other connection with the will than that of legatees thereunder. Before a legacy can be held to be made in discharge of a debt, *or in compensation for services to be rendered by executors*, there must be language in the will from which such an intention can be inferred. Here there was none. (Italics ours.)

In the recent case of *Matter of O'Donohue Estate*, 115 N. Y. Misc. 697, the testatrix in her will provided:

> I give and bequeath to my executors and executrices hereinafter named $1,200.

In the latter part of the will the testatrix appointed her three children executors and directed that "they serve without fees." An appeal was taken by the executors from the order entered upon the report of the transfer tax appraiser on the ground that he had not permitted them to deduct the statutory commissions, which greatly exceeded the total amount of the bequests to the executors. The Surrogate in modifying the order and allowing a deduction of $1,200 to each person named as executor, said (p. 698):

> Reading these paragraphs together, the will must be construed *as fixing $1,200 as the*

compensation of each executor in lieu of fees. The latter clause quoted above would then read as if the testatrix had said "they shall serve without fees, *excepting the compensation hereinbefore fixed.*" As my colleague, Surrogate Cohalan, pointed out in *Matter of Neustadter*, N. Y. L. J., August 16, 1913, the executors named could have renounced their appointment and an administrator c. t. a. would have been appointed. They qualified, however, and not having renounced the specific compensation within four months from the date of their letters (sec. 2753, C. C. P.), they must be held to have accepted the limited allowance fixed by testatrix *in lieu of their statutory commissions.* (Italics ours.)

The rule that bequests to executors in lieu of commissions are compensative and not donative is recognized throughout the country.

In the case of *Renshaw* v. *Williams*, 75 Md. 498, the testatrix's will provided (p. 503) "I give and bequeath to E. Calvin Williams, of the said City of Baltimore, the sum of $5,000 absolutely." A subsequent clause of the will provided, "I hereby nominate, constitute, and appoint my son-in-law, Genl. Frank H. Starring, and E. Calvin Williams, of the City of Baltimore, and State of Maryland, the executors of this my last will and testament; * * * and, as I have left to each of my said executors legacies by this will, it is my will that said legacies to each of them respectively shall be in lieu of commissions as such executors * * *."

It will be noted that the will, so far as the bequest to the executors is concerned, is on all fours with the will here involved. The bequest is made in an early part of the will to the parties named as executors without mentioning them as executors. In the clause appointing the executors it is provided that the bequests given them in the earlier part of the will "shall be in lieu of commissions as such executors."

Objections were filed to the probate of this will and Williams was appointed Administrator *pendente lite*. The will was admitted to probate. Williams thereupon qualified as executor and was afterwards allowed the legacy of $5,000. He was also allowed on an accounting by the Orphans' Court $2,945 commissions under the Maryland Statute for his services as Administrator *pendente lite*. Upon appeal, the Court disapproved of the allowance of commissions to the executor for his services as administrator *pendente lite* under the statute, saying (pp. 505, 507, 509):

> There can be no doubt that the legacy was given to Mr. Williams, not as a gratuity, and not unconditionally, but *in lieu of commissions* as executor. Upon this subject the will is explicit. * * * *That legacy was given as a payment for all the labor and services which Mr. Williams might perform in completely settling Mrs. Conine's whole personal estate.* * * * But where he has been bequeathed, in lieu of commissions, a legacy larger than the commissions would amount to, and does as

> administrator *pendente lite*, only that which he was bound to do as executor, *the legacy must be treated as a full compensation for all the labor it was intended to cover*, namely, the entire administration of the whole estate * * *. (Italics ours.)

In *Matter of Runyon's Estate*, 125 Cal. 195, the will provided as follows:

> In lieu of the commissions allowed by law for executors, which I deem insufficient, I do hereby provide that my said executors shall be entitled to receive the sum of $5,000 each as and for full compensation for their services, respectively, as such executors, in addition to their actual expenses.

In this case one executor, with the consent of the other, continued in the actual management of farm properties left by the testator in widely separated parts of the State. Upon the accounting he asked the Court, under the California Code, to make a further allowance for extraordinary services rendered. The Court denied the application, holding that the compensation fixed by the will must be deemed ample for all services rendered, and saying, in its opinion (page 197):

> The compensation of an executor, whether according to the rates fixed by the statute, or as determined by the testator, is not a gratuity, but is in consideration of the services he may render * * *.

In the case of *In re Hays's Estate*, 183 Pa. 296, there was an appeal from a decree surcharging the ex-

ecutor's account with the amount of commissions charged in excess of the compensation fixed by the will. The provision of the will in that case was:

> To each of the executors of this my last will and testament I bequeath the sum of one thousand dollars, as and for compensation for their services as such executors.

It was held that executors accepting the office with knowledge of the provision of the will fixing their compensation were bound thereby, and that the two executors were entitled to only $1,000 each. The Court, in a well-considered opinion, said (at page 297):

> We held in *Shippen* v. *Burd's Ex'rs.*, 42 Pa. 461, under a will which prescribed the method and the extent of the compensation which was to be received by the executors for all the services to be performed by them, the executors were bound by the provisions of the will in this respect. There was a trust to be executed in relation to certain real estate, and as to this the executors claimed additional compensation because they were acting as trustees which was a service outside of their duties as executors. But we held that although this was a trust the executors were bound to execute it as executors, and it was therefore a part of their duty as executors, and the compensation provided for them as executors must be regarded as conclusive upon them as to all duties which devolved upon them in the execution of the will. We said, "Executing the trust was but executing the will, and

> for this we have seen that provision was made in express words by the testator for the payment of commissions occurring for additional services to be rendered by them (the executors) in executing my will and codicils. The intention of the testator, we think, is clear that for these services the executors are to be paid out of the estate, and not by the devisees." The fundamental principle upon which this decision was based was that the executors, having accepted their office under the will, were bound by its terms in respect of the compensation they were to receive as such.

The testator in the later case of *Sweatman's Estate*, 223 Pa. 552, provided in his will that each of three executors should receive $6,000 "in lieu of all commissions." All three qualified. Four months thereafter one of them died and the Court was called upon to determine whether the representative of the deceased executor should receive the $6,000 in full. The Court held that the representative was so entitled, saying (p. 553):

> We think * * * Mr. Caven's estate is entitled to the $6,000 in full. The testator himself determined the sum that he should receive and took the risk of his executor's illness or death; the executor by accepting the post took with it the chance that the *labor* entailed might be greater than he could reasonably anticipate.
>
> Did the amount named prove to be too small we would be powerless to increase it * * *. And when the executor once qualified as executor,he became entitled to some compensation—

> whether little or much is immaterial; his death did not deprive his estate of his right to *what had been earned*, and it was in lieu of that *compensation* that he was given his *legacy*.
>
> It must be presumed as was said in Harper's Appeal, 111 Pa. 243, that the testator had in mind the possibility that death might reduce the number of his executors and that he considered such a contingency when he fixed the *compensation* to be paid to each of them. (Italics ours.)

In *Connolly* v. *Leonard*, 114 Me. 29, the testator devised real property to his executor and trustee "in lieu of any payment for services as executor or trustee" and further provided that it was so to be accepted and understood by the trustee in accepting it. The question arose whether the trustee was entitled to statutory commissions in addition to the devise. The Court said (p. 31):

> In view of the language used in the will at bar, we have no hesitation in saying that Matthew J. Leonard is not entitled to commissions as executor in addition to the legacy therein provided.

In *Sinnott* v. *Kenaday*, 14 App. D. C. 1, reversed on other grounds, 179 U. S. 606, it was sought to deny commissions to an executrix upon the ground that a bequest of a $5,000 bond contained in the will of the testator was given as compensation. The Court in overruling this contention said (p. 24):

> The bequest of the Richmond bond was to "my wife and executrix" without other desig-

> nation, but nothing to indicate that it was given by way of compensation and to be taken *in lieu of commissions*. The descriptive words used to designate the legatee were entirely natural and proper and were intended as mere *descriptio personae* of the legatee; and if the wife had failed to obtain letters testamentary she would, doubtless, have taken the legacy, notwithstanding her failure to become executrix by qualification. This legacy, therefore, can not be treated as compensation in the place and stead of the commissions allowed by law. The terms of the bequest will not bear any such construction. (Italics ours.)

In the case of *John L. Batchelder, Petitioner*, 147 Mass. 465, the testator, after making a bequest to his wife, and giving her for life the income from the residuary estate, which he bequeathed to trustees in trust for that purpose, further provided (p. 466): "Upon the decease of my said wife, I hereby give, devise, and bequeath all of said estate so devised and bequeathed to trustees as aforesaid, as follows: $5,000 each to said John L. Batchelder and David O. Paige for the faithful performance of their trust." It appears that the testator and his wife died in the same accident. The trust for her benefit therefore never arose. One of the trustees claimed the bequest, but the Court denied the claim, saying (p. 470):

> The first of the legacies which are given, as we have stated, by the residuary clause, after the death of testator's wife, are gifts of $5,000 each

> to the two trustees for the wife "for the faithful performance of their trust." The words used expressly make the faithful performance of the trust the consideration and the condition of the right to the legacies, and negative the supposition that the legacies are given unconditionally, as marks of personal regard. Even if we should go so far as to say that the gifts of $5,000 are in addition to such ordinary compensation as might be allowed by the court, in view of the provision deducting from gross income all necessary expenses and legal charges incident to the management of the estate, still it is clear that they are compensation and conditioned as we have said. The trust has failed and the legacies fail with it.

It may be contended that plaintiffs in error would have been entitled to the bequests had they not qualified. This is not the law. *Fletcher* v. *Hurd*, 14 N. Y. Supp. 388; 60 Hun, 576. In that case the bequest was of the residue of the testator's estate "to my said executors to be divided equally between them in lieu of compensation for their services in the execution of their trust." The General Term of the Supreme Court for the Fourth Department held that the bequest was intended to compensate the executors, and that one who failed to qualify was not entitled to any part of the bequest, saying (pp. 389, 390):

> If only one qualifies, and the other is not in a position to perform any duties, and does not perform any, can it be said that the testator

> in that event intended, by the use of the expression above quoted, to provide that the one not so qualifying should still have the one-half? *That would convert a bequest in compensation for services into an absolute individual gift.* There is nothing in the will that indicates that such was the intention. * * * The will imposed certain duties, and provided compensation for such duties. The benefit is to be received by the party bearing the burden. (Italics ours.)

See also *Matter of Accounting of Mason, supra.*

It will be further claimed that the bequests to plaintiffs in error were donative and not compensative. The cases cited in the Circuit Court of Appeals in support of the contention—

> *Morris* v. *Kent*, 2 Edw. Ch. 175;
> *Scofield* v. *St. John*, 65 How. Pr. 292;
> *Harrison* v. *Rowley*, 4 Ves. Jr. 212;
> *Angermann* v. *Ford*, 29 Beav. 349;
> *Lewis* v. *Matthews*, L. R. 8 Eq. 277;
> *Brydges* v. *Wotten*, 1 Ves. and Beam. 134—

are readily distinguishable. *Scofield* v. *St. John* is cited and distinguished in *Matter of Hurd, supra.* *Morris* v. *Kent* is an old New York case and of little value in determining a question which arises under later statutes. The other decisions are English cases and clearly inapposite when the difference between the American rule and the English rule is borne in mind. As pointed out above, the office of executor under the English law is an honorary one and the executor or other fiduciary receives no compensation for his services as such. This rule does not now

obtain in America, as we have seen. Moreover, in England, a bequest to an executor is presumed to be—

> given to him in that character and is attached to the office, and it is incumbent on him to show something in the nature of the legacy, or other circumstances arising on the will, to rebut that presumption. (*Halsbury's Laws of England*, Vol. XIV, p. 270.)

Exactly the contrary is the rule in America. (*Matter of Accounting of Mason, supra; Matter of Sprague*, 46 Misc. 216.)

Even under the common law, it has been held that an executor who does not act is not entitled to the legacy (*Abbott* v. *Massie*, 3 Ves. 148) even though prevented from acting by age or infirmity (*Halsbury's Laws of England*, Vol. XIV, p. 271; *Hanbury* v. *Spooner*, 5 Beav. 630; *Calvert* v. *Sibbon*, 4 Beav. 322; *In re Hawkins' Trusts*, 33 Beav. 570). The English Courts have also held that an executor who proved the will without any intention of acting thereunder would be disallowed the legacy.

Harford v. *Browning*, 1 Cox. Eq. Cas. 302.

An examination of these cases indicates that even under the English rule the person designated as executor in order to become entitled to the bequest given to him in his capacity as executor was required to qualify or do some act plainly indicating an intention on his part to qualify and act.

The cases cited by respondents in the Court below as holding that bequests to executors in lieu of compensation abate for an insufficiency of assets are clearly not law to-day. *Richardson* v. *Richardson, supra; Harper's Appeal*, 111 Pa. St. 243.

Heaton in his work on Surrogate's Courts says in this regard (3rd ed., vol. 2, p. 598):

> The sum to be paid for the services of an executor is often fixed by will. When it is specified as for compensation it should not be treated as a legacy unless the will shows an intention to so give it, and the sum should not abate with other legacies.

Furthermore, the cases relied upon by respondents are predicated upon the English rule that an executor is not legally entitled to compensation and that any amount given him by will is necessarily a gratuity. As we have seen, the office of executor in New York is not a gratuitous one. The reason for the rule thus fails and with it the rule itself.

That the testator fully realized the significance of his act in specifying in the 16th paragraph of his will that the bequests to his executors and trustees are in lieu of the statutory commissions to which they would otherwise be entitled would seem to be clearly established by the following circumstance: In *Matter of Vanderbilt*, 68 N. Y. App. Div. 27, the present testator whose will is now under consideration was named as one of the executors and trustees under the last will and testament of Cornelius Vanderbilt. The will provided bequests of large sums of money to each of the persons who later in the will were named as executors and trustees. Included in the will was a direction that the executors should receive no compensation for their services. The Surrogate sustained the action of the transfer

tax appraiser in refusing to deduct, under the provisions of Section 227 (now Section 226) of the Tax Law of the State of New York, the commissions to which the executors would have been entitled by law.

The Appellate Division, First Department, in affirming the order of the Surrogate, said (pp. 29, 30):

> In *Matter of Gihon* (*supra*) it was also decided in effect that commissions allowed by law to executors and trustees should also be deducted in the same manner as United States legacy taxes, but the special provisions of Mr. Vanderbilt's will are such as to render inapplicable as authority what was decided in that behalf in the *Gihon* case. * * * Mr. Vanderbilt in his will provided as follows: "I direct that no compensation or commission as such shall be paid to any living executor or trustee under this will for any services as executor or trustee hereunder." It is obvious that the testator intended that his estate should not be diminished by these ordinary expenses of administration, and it is equally obvious from a general survey of the will that *the legacies given to the executors were not so given in lieu of commissions.* The meaning of section 227, above cited, may be that where legacies are given for the services of executors and are to be a substitute for statutory allowances, an exemption from taxation, to the extent of such legacies, is created; but we can not find from anything in this will that these legacies to the individuals appointed executors were in any way dependent upon or affected by the performance of executorial duties. (Italics ours.)

It is very evident that Alfred G. Vanderbilt, whose will is now under consideration, expressly provided that the bequests were compensation and in lieu of commissions in order that his estate, which was of a considerable size, might have the benefit of the provisions of the tax law referred to, and advantage of the Statute was doubtless taken by respondents as executors of his estate.

CONCLUSION.

If I seem to have argued this case at unnecessary length, it is because it involves, in principle, in this age of large fortunes a substantial sum to the United States Treasury. There is a growing custom for men of large means to fix themselves the compensation of their executors and trustees in order to avoid the large deductions from the amount of the estate which the payment of the statutory fees of executors and trustees would cause. It is for this reason that the so-called bequest in lieu of commissions is generally less than the statutory commission would be. Moreover, there are many lawyers who specialize in acting as executors and trustees in the settlement of estates, and it is conceivable that a very large income of such a practitioner might wholly escape taxation by the simple device of so writing the wills of his clients that he would get his compensation, to which he has a legal right, under a so-called bequest and not by order of the court.

Taxation is a very practical matter. Indeed, it is the most practical matter known to Government. It

cares little for legal forms, or legal expressions, or legal devices. It concerns itself with the substance of the thing upon which it imposes the tax.

Take for example the present case. Mr. Vanderbilt left a very large fortune. Of this the will itself is ample evidence. He made the two respondents his executors and trustees. As such they render important duties and must continue to do so as long as the long-term trusts continue. As such, upon acceptance of the trust, they had a vested right to statutory commissions, and if there had been no statute fixing the commissions on a percentage basis, they could have asked the court to allow them on the basis of a *quantum meruit* reasonable commissions. Assuming that Mr. Vanderbilt left an estate of $25,000,000 they would have thus received, either under the statute or by allowance of court in the absence of a statute, a compensation—not the gratuity of the testator—which would have approximated that given to them by the so-called bequest.

In that event, could it fairly be disputed that their earnings as executor and trustee would be subject to an income tax?

If so, and taxation is a practical matter, how can the taxgatherer be defeated by the simple expedient of the testator giving to them by the so-called bequests that to which in any event they would have been entitled?

I do not contend that every bequest in lieu of commissions is necessarily to be treated as purely compensatory and not *in part* donative.

I doubt whether any general rule in this matter can be laid down, and in each case it must be a question of fact whether the provision was in whole or part compensation and not a gratuity, and the fact must depend to some extent upon the intention of the testator.

This was recognized by the learned judge of the District Court who sustained the Government's contention in this case. In his first opinion he leaned to the view that where a testator made a bequest and declared it to be in lieu of his executor's compensation that it would be "obviously impossible to say whether these bequests were not in part bounty, even if the commissions should turn out much less."

Judge Hand added:

> But if he (the testator) has in fact bequeathed the sum to him as compensation, how can I apportion it partly as such and partly as free bounty? Clearly not, if the language be unambiguous.

Treating the question as one of intention he construed the sixteenth clause as meaning that the legacies were compensation for services to be rendered and therefore concluded that the whole of the legacy must be treated as compensation because the testator had so said.

On further reflection he modified this view in a supplemental opinion by saying:

> In this case, as I said on my original opinion, the question was not argued at bar whether assuming that the legacies were in fact taxable they must be taxable altogether,

> I did consider that question and decided that they were taxable in whole. Subsequent reflection has led me to doubt whether this is necessarily the case, and I am therefore not prepared to give judgment absolute unless the defendants do not choose to answer over. It is in any case enough that the plaintiff is entitled to some relief; that being so, the demurrers must be overruled. If, however, the defendants wish to insist that the legacies are taxable only in part, that part to be ascertained by reference to the amount given as compensation, assuming there is a way of dividing them, they must plead a partial defense.
>
> I have, therefore, signed judgments "respondant over" and the defendants may plead if they will. If they are content to rest their case upon the demurrers, they can allow judgment absolute to pass against them at the expiration of the time to plead over.
>
> Anything I said in my original opinion regarding the impossibility of dividing the legacies for the purpose of taxation must be regarded as not decided until some further argument.

The respondents were thus given the opportunity to show by way of answer and proofs that while the bequest was declared to be "in lieu of compensation," yet as a matter of fact it was in whole or in part a mere gratuity and not given as compensation.

Obviously the respondents could not prove that the bequest was *wholly* a gratuity in view of the plain language of the testator and the fact that in

accepting the benefit of the bequest they waived their statutory right to compensation. Nevertheless, it was still open to them to convince the court as a matter of fact that the bequest was so much greater in amount than any possible compensation could have been that the testator must have had in mind that a part thereof was a gift of affection and not in payment of a service.

This more difficult question is, however, not involved in this case, *for the respondents declined to answer and raise this question of fact,* and thus virtually acquiesced in the conclusion of the District Court that there were no special circumstances in this case to impair the full force of the testator's declaration that the sums he gave were the substitute as compensation for the compensation allowed by statute.

In effect, the respondents thus admit that the bequest was not so disproportionate in amount to the statutory compensation as to justify the belief that in part it was a mere gratuity.

This court will, therefore, assume either—

(1) That the compensation that the respondents received by a bequest was approximately that which they would have received in any event by the statute; or,

(2) That the testator, having in mind the magnitude of his estate and the length of the trusts, himself fixed as just compensation for the respondents' services the sum he gave them.

The question, therefore, remains whether an executor and trustee, who by reason of his skill and

work is entitled to statutory fees, and who upon such statutory fees would be obliged to pay an income tax, can be relieved of such a tax by the unimportant fact that *the testator gave the same recognition to the value of the services as the law would have done in any event.*

So stated, the question hardly admits of doubt, for the law would not permit of such inequality as would exist if one executor paid an income tax upon statutory fees and another executor was exempt from the same tax merely because the testator had directed the payment which the law already required.

For these reasons the Government contends that the judgment of the Circuit Court of Appeals should be reversed and the judgment of the District Court reinstated, which would simply mean that *in this particular case* the respondents received the sums upon which they are taxed by way of compensation and not as a gratuity. Other cases arising under different provisions of a will or under different circumstances can be decided as and when they arise.

Respectfully submitted.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1923.

THE UNITED STATES OF AMERICA, Petitioner, *v.* FREDERICK L. MERRIAM.	No. 67.
THE UNITED STATES OF AMERICA, Petitioner, *v.* HENRY B. ANDERSON.	No. 68.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR FREDERICK L. MERRIAM AND HENRY B. ANDERSON, RESPONDENTS.

These cases are before the Court on writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit, to review judgments of that court (282 Fed. Rep. 851) reversing judgments of the District Court of the United States for the Southern District of New York overruling demurrers by the respondents to the amended complaints of the petitioner (275 Fed. Rep. 109).

Statement.

The cases present the question whether certain legacies bequeathed to the respondents by the late Alfred G. Vanderbilt are taxable as income under the Income Tax Law of 1913 (38 Stat. 114, 166, approved Oct. 3, 1913).

Mr. Vanderbilt died on May 7, 1915, and his will was admitted to probate on June 16th following (R. 2).

The bequests which have given rise to the cases were made by the eleventh article of the testator's will (following provisions for certain members of his family). That article, in its entirety, is as follows (R. 8):

> "ELEVENTH: I give and bequeath to my brother Reginald C. Vanderbilt Five hundred thousand dollars ($500,000); to my uncle, Frederick W. Vanderbilt, Two hundred thousand dollars ($200,000); to Frederick M. Davies, Five hundred thousand dollars ($500,000); to Henry B. Anderson, Two hundred thousand dollars ($200,000); to Frederick L. Merriam, Two hundred and fifty thousand dollars ($250,000); to Charles E. Crocker, Ten thousand dollars ($10,000), and to Howard Lockwood, One thousand dollars ($1,000).
>
> I give and bequeath to each of those persons who may be in my employ at my farm known as 'Oakland Farm', at Portsmouth, Rhode Island, or on my properties known as 'Sagamore Lodge', Camp 'Kill-Kare', or 'Moose River Tract', or on any of my other property in Hamilton County, New York, or in my stable or garage in the City of New York, or in my apartment in Gloucester House in London, England, at the time of my decease, and who at that time shall have been in my employ for a period of five years consecutively, an

amount equivalent to his or her wages for the last year of such period."

In 1915, in the regular course of the administration of the estate, all the bequests made by this article were paid, and Mr. Merriam received the $250,000 "given to him by said will" and Mr. Anderson received the $200,000 "given to him by said will" (R. 2).

Prior to March 15, 1916, the respondent in each case made a return of his taxable income, and paid the tax concededly due from him. Neither included in his return his legacy from Mr. Vanderbilt (R. 3).

The respondents did not return the bequests to them as taxable income because in the law then in force (as in all subsequent laws) Congress not only omitted to include legacies or bequests in its definition of taxable income but expressly provided that "income of a taxable person" shall not include "the value of property acquired * * * by bequest." The definition of what is and what is not taxable under that law is found in section II, B of the statute, the pertinent part of which is as follows:

> "That, subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include gains, profits, and income derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, businesses, trade, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property, also from interest, rent, dividends, securities, or the transaction of any lawful business carried on for gain or profit, or gains or profits and income de-

> rived from any source whatever, including the income from but not the value of property acquired by gift, bequest, devise, or descent: * * * "

By the sixteenth article of his will Mr. Vanderbilt appointed his brother, Mr. Reginald C. Vanderbilt, his uncle, Mr. Frederick W. Vanderbilt, and Mr. Frederick M. Davies, Mr. Anderson, and Mr. Merriam as executors of and trustees of the trusts created by his will, directed that no bond should be required to qualify them as such, and then added that:

> "The bequests herein made to my said Executors are in lieu of all compensation or commissions to which they would otherwise be entitled as Executors or Trustees" (R. 12).

Mr. Anderson and Mr. Merriam qualified as executors of the will and were acting as such when these actions were begun (R. 2).

Although, of course, it does not appear in the records in these cases it is a fact that like actions against Mr. Reginald C. Vanderbilt and Mr. Frederick W. Vanderbilt are pending, and that Mr. Davies died five days before the death of the testator and his legacy consequently lapsed.

Following an audit of the returns of the respondents, the Commissioner of Internal Revenue notified them that this last quoted provision of the will made their legacies taxable; and upon their refusal to assent to assessments of additional taxes upon the bequests, he caused these actions to be brought.

Contentions of the Parties.

The petitioner contends that the moneys which Mr. Vanderbilt gave to his brother, to his uncle,

and to the respondents, and the moneys Mr. Davies would have received under the bequest to him had he lived a week longer than he did, were not bequests in the current lay or legal sense of the term, or within the meaning of the Income Tax Law, but that the giving of them was merely a testamentary fixing of the compensation to be paid to them for personal services rendered to the estate.

In support of that contention counsel for the Government argue, as they did in the courts below, first, that the word "bequest" as well in the terminology of the law as in its general acceptation implies and includes only an unconditional gratuity, and that it is in such sense that it is used in the Income Tax Law; and second, that in legal intendment the legacies in question were given as a stipulated compensation for personal services actually to be rendered by the legatees in the administration of the testator's estate.

The respondents contend, as they did in the courts below, first, that the legacies so given to them were bequests in the universally accepted as well as the legal meaning of the term, and that it is in that sense that "bequest" is used in the Income Tax Law; and secondly, that even if the Income Tax Law did not in terms provide that these bequests are not taxable income, they would not be taxable because they were not given as consideration for services and were not "derived from labor." (*Merchants' Loan & Trust Company* v. *Smietanka*, 255 U. S. 509, 517.)

It is stated in the "Conclusion" of the brief for the Government that, in this day of large fortunes, these cases involve, in principle, a substantial sum to the United States Treasury in that if the contentions of the respondents be sustained

and the judgment of the Circuit Court of Appeals be affirmed, "it is conceivable that a very large income * * * might wholly escape taxation by the simple device of so writing wills" that an executor "would get his compensation, to which he has a legal right, under a so-called bequest and not by order of the court." That statement at once not only assumes there is no distinction in law or in fact between a bequest in lieu of commissions on the one hand and a mere testamentary direction for the payment or an award by a court of specific compensation for services actually to be rendered—a distinction which goes to the very root of the cases, as we shall show—but it ignores the most essential practical fact involved in the cases. *A bequest in lieu of commissions is taxable as part of the net estate of the testator under the Estate Tax Law of the Revenue Act of 1921, as it was under the earlier estate tax laws, and if it be taxable also as part of the net income of the legatee under the Income Tax Law, it is subject to a double tax under a single act at rates which in the aggregate are practically confiscatory, as we shall show infra.*

Specifically, then, there are before the Court for consideration the following questions:

(1) Were the legacies given to the respondent's "bequests" in the generally understood and legal sense of the word?

(2) Disregarding the provision of the statute that "property acquired by bequest" is not taxable income, were or were not these legacies given as consideration for services actually to be rendered; or, stated in other words, were they as a matter of fact or of law "derived from labor"?

POINT I.

"BEQUEST" AND "COMPENSATION" ARE USED IN THE ACT OF OCTOBER 3, 1913, IN THE SENSE IN WHICH THEY HAVE BEEN DEFINED BY THE COURTS.

It is asserted, emphatically, by counsel for the Government in the "Conclusion" of their argument (Government's Brief, pp. 33, 34), that taxation, as a practical matter, "cares little for legal forms, or legal expressions, or legal devices," but rather "concerns itself with the substance of the thing upon which it imposes the tax."

Whatever of truth there may be in that broad generalization, certainly it will not be denied that it is a settled principle of law, applicable in the construction of every taxing statute, that in the practical exercise of its taxing power a legislative body is presumed to know the adjudications of the courts defining the terms it employs and is presumed to use language so defined in the sense of such definition; and, therefore, that if the bequests made by Mr. Vanderbilt to the respondents either were bequests in the legal sense of the term, or were not "compensation" within the judicial definition of that word, they were not taxable as income. (*Lessee of Levy v. M'Cartee*, 6 Pet. 102, 110; *Maillard* v. *Lawrence*, 16 How. 251, 261; *Kepner* v. *United States*, 195 U. S. 100, 124; *Norfolk Southern R. R. Co.* v. *Chatman*, 244 U. S. 276, 280, 281; *Towne* v. *Eisner*, 242 Fed. Rep. 702, 704).

POINT II.

"BEQUEST" IN THE LEGAL AS WELL AS THE COMMON ACCEPTATION OF THE WORD INCLUDES EVERY VOLUNTARY DISPOSITION OF PERSONAL PROPERTY BY WILL.

A.

Every voluntary disposition of personal property by will, whether it be conditional or unconditional, or with or without consideration, is a "bequest" in the familiar, everyday understanding of the term and in its legal sense (*Jessup-Redfield's Law and Practice in the Surrogates' Courts,* section 917, p. 1138). That the word is not limited either in its lay or legal meaning to an unconditional or gratuitous transfer, is, and through the whole history of the Law of Wills has been, settled and established.

Thus, for example, the very common bequest in lieu of dower, a legacy conditional upon the surrender by the legatee of her right of dower, is a bequest by the test of every definition of the term. It was so held in *Orton* v. *Orton*, 42* N. Y. (3 Keyes), 486, where the very contention now made by counsel for the Government was repudiated. In that case the testator gave to his wife a legacy in lieu of dower, and then provided that should there be a surplus of his estate after the payment of all legacies, the legatees should share proportionately therein. The executors insisted that the widow was not entitled to any part of the surplus on the ground that a bequest in lieu of dower is not a legacy, and, therefore, she was not a legatee. The court said:

"*Notwithstanding the bequest to the*

wife was declared to be in lieu of dower, it is incorrect to say that it was not a legacy. Such it was in legal as well as common parlance, and it is constantly called by that name in the books. (2 *Williams on Executors,* 1169, 1170; 2 *Redfield on Wills,* 553, n. 25; 1 *Roper on Legacies,* 297, 432; *Wake* v. *Wake,* 1 Ves. Jr. 335; *Williamson* v. *Williamson,* 6 Paige, 298). Every bequest of personal property is a legacy, including as well those made in lieu of dower, and in satisfaction of an indebtedness, as those which are wholly gratuities. *The circumstance whether gratuitous or not, does not enter into consideration in the definition.* It is the synonym of the word 'bequest.' Thus, in Jacob's Law Dictionary, it is defined to be 'a bequest or gift of goods and chattels by will or testament.' In Bacon's Abridgment a legacy is defined, 'a gift or bequest of a particular thing by testament' (Bac. Ab. Legacy). 'The word "devise" is specially appropriated to a gift of lands, and the legacy to a gift of chattels.' (Id. note). *And when it is said that a legacy is a gift of chattels, the word is not limited in its meaning to a gratuity, but has the more extended signification, the primary one given by Worcester in his dictionary, 'a thing given, either as a gratuity or as a recompense.'* " (487.) (Italics ours.)

In that last quoted sentence of the New York Court of Appeals is the complete answer to the deduction drawn by counsel for the Government from the definitions quoted in pages six to nine inclusive of their brief. If a legacy "in lieu of dower" is a "bequest" in "its ordinary meaning and legitimate effect" (42* N. Y. 486), if one to whom such a bequest is made "obviously" takes as a "legatee" as counsel for the Government admit on page nine of their brief, certainly it

cannot be denied that a bequest in lieu of commissions likewise is a "bequest" in "its ordinary meaning and legitimate effect."

Bequests to creditors upon condition that they be accepted as a satisfaction or in discharge of the testator's indebtedness are of common occurrence. In fact, there is a general rule of construction that presumptively a legacy to a creditor which is equal to or greater than his claim against the testator will be deemed to be in satisfaction of the debt. Out of that rule has grown up an important and very considerable body of law, to be found in reports of hundreds of cases in which there has arisen the question whether in the particular will under consideration there was or was not evidence of a testamentary intention that the legacy should form an exception to the general rule (*Glover* v. *Patten,* 165 U. S. 394, 411; 40 *Cyc.* 1885 *et seq.*) In none of those cases will there be found a suggestion that such a legacy is not a "bequest" in the legal sense of the term, as distinguished from a mere direction to pay the creditor his debt. Indeed, it is an established principle that a direction by the testator that his debts shall be paid negatives the presumption that a bequest to a creditor is conditional upon a waiver of his claim and makes his legacy absolute (*Boughton* v. *Flint,* 74 N. Y. 476, 482; 40 *Cyc.* 1886).

It has been always recognized that such legacies are bequests "in legal as well as common parlance," and they are "constantly called by that name in the books" (*Orton* v. *Orton,* 42* N. Y. (3 Keyes) 486).

So it is of bequests to executors or to trustees in lieu of compensation for their services or "for their care and pains." They have always been "bequests" in any and every sense of the word.

They have been uniformly so characterized and defined by judges and lawyers and text book writers; and as such, therefore, *they abate with other general legacies in case of deficiency of assets.*

In *Morris* v. *Kent*, 2 Edw. Ch. 175, 179, it was said:

> *"A legacy to an executor even expressed to be for care and pains, is not to be regarded in the light of a debt or as founded in contract, or to be governed by the principles applicable to contracts. If it were so, an executor, who takes upon himself the office and discharges its duties, would be entitled to his legacy in preference to all other legacies, even if there were a deficiency of assets to satisfy all of them. But, so far from it, the point has been repeatedly determined and it is now settled law, that a legatee of this description must abate equally with other legatees * * *."*

In *Waters* v. *Collins*, 3 Dem. N. Y. 374, one Waters bequeathed to Collins, $700 "over and above any and all commissions" he might be entitled to receive "upon the condition that said Collins shall accept, qualify and act as executor." In that case Collins was required to do much more to become entitled to his legacy than the executors of Mr. Vanderbilt's will were required to do in order to get absolute title to their legacies, as we shall see. Collins claimed that the bequest to him was compensation for his services and, therefore, did not abate with the general legacies. The court, holding the bequest was a general legacy and subject to abatement, said:

> *"In behalf of Mr. Collins * * * it is urged that the bequest for his benefit is not mere bounty, but is in the nature of*

> *compensation for services that the testator expected him to render, and that, since testator's death, he has in fact rendered in the management of this estate;*
> * * * *The executor's claim to priority because of the supposed consideration for the legacy in his behalf is not well founded.*
> In *Heron* v. *Heron*, 2 Atk. 171, *it was held by Lord Hardwicke that bequests to executors, even though given expressly for 'care and pains', did not differ from general legacies so as to take them out of the ordinary rule in respect to abatement for deficiency of assets.* The same doctrine was asserted in *Attorney-General* v. *Robins* (2 P. Wms. 24); in *Fretwell* v. *Stacy* (2 Ver. 434); and in *Duncan* v. *Watts* (17 Beav. 204). * * *
> I hold that, in case of a deficiency of assets, the two legacies must abate *pro rata.* (*Blower* v. *Morret*, 2 Ves. Sen. 419; *Beeston* v. *Booth*, 4 Madd. 161; *Thwaites* v. *Foreman*, 1 Coll. C. 409; *Wood* v. *Vandenburgh*, *supra*)". (Italics ours.)

In *Clayton* v. *Akin*, 38 Georgia, 320, 195 Am. Dec. 393, one Clayton "gave and bequeathed" to Akin $1,000 "for any extra trouble he may have in executing this my will." Akin claimed that the money so given to him was an expense of administration of the estate and for that reason did not abate proportionately with other general legacies. The court said:

> *"The legacy of one thousand dollars to the executor is, in every aspect of it, a general legacy; and as to abatement, in case of a deficiency of assets, must take its fate as such. It has been argued that the terms of the bequest are such that the legatee, in this case, is not a volunteer, but stands upon the footing of a purchaser. The authorities are abundant against this position*: 2 Wil-

liams on Executors, 1171; *Fretwell* v. *Stacy*, 4 Ves. 434; *Attorney-General* v. *Robins*, 2 P. Wms. 23; *Herron* v. *Herron*, 2 Atk. 171. In all these cases the legacy was for "the care and pains" of the executor—language which is, in effect, the same as is used by Mr. Clayton. It will be observed that this is not a question whether the legacy is a good one, or whether it is dependent on the executor acting, but whether it is a legacy which may be called upon to abate, with other general legacies, on a deficiency of assets. * * * As a legacy, therefore, this must be considered a general legacy, liable, if necessary, to abate as such. *The Court* (below), *in this case, seems to have considered this one thousand dollars as part of the expenses of administration. It is either a legacy or nothing.* * * * Here is a fixed sum of one thousand dollars, given as a legacy. We are not able to see the force of the argument which gives this the dignity of expenses. *It is a legacy, and nothing more, nothing less, given for good reasons and with good purposes, and standing upon the footing of other legacies, given for considerations and motives not amounting to a legal obligation, as past kindnesses, affection, moral obligations, etc.*" (Italics ours.)

In *Turnipseed* v. *Sirrine*, 60 S. C. 272, the Supreme Court of South Carolina *held that a bequest in almost identically the same terms as the bequests to the respondents was a conditional legacy as distinguished from compensation for services.* In that case the facts were that a Mrs. Neblett made a will in which, after making a number of bequests and providing for the disposition of her residuary estate, she appointed Sirrine executor and bequeathed to him

"$1,000, * * * which is to be *in*

> *lieu of all fees* due him for his services in managing and carrying out the provisions of this my last will and testament."

The will was admitted to probate and Sirrine qualified and entered upon the administration of the estate. Thereafter the plaintiff, Mrs. Turnipseed, brought an action to establish a claim to the entire estate upon the ground that the testatrix and she had entered into a contract to make mutual wills. The contract having been established, the court held that Mrs. Turnipseed was entitled to recover the entire estate with the exception of the bequests to which she had assented. Upon a settlement of his accounts as executor Sirrine claimed that he was entitled to the bequest of $1,000 to him, to which Mrs. Turnipseed had not assented, because it was to be accepted in lieu of fees. The court denied his right to the legacy but did allow him the *prescribed statutory commissions* for his services as executor, saying (60 S. C. 272, 290):

> "As I announced early in this opinion, the decision of this case by the Supreme Court (on a former hearing) decided that all legacies except those consented to by the plaintiff were null and void. *This is a legacy.* It may be said that, because it is therein provided that such legacy shall be accepted in lieu of all fees due to the executor, it may be allowed to operate. Suppose it had been $5,000 or $10,000, *with the same condition annexed*, would that not be a palpable evasion of the plaintiff's right to the ownership of the whole estate, after the payment of the legacies * * * to which Mrs. Turnipseed assented? * * * Let the executor receive his legal commissions."

Additional cases of like import might be cited,

but the foregoing and other authorities *infra* establish, it is submitted, beyond question that the legacies given to the respondents and those given by the testator to his brother and to his uncle, and that which he would have given to Mr. Davies had the latter lived a few days longer than he did, are bequests in the generally accepted and judicially sanctioned meaning of the word. Not only are they so defined by the courts and so referred to in everyday speech, but they are called by that name in the amended complaints in these actions and throughout the brief of counsel for the Government, because there is no other word that is descriptive of them; and if "bequest" in its legal and in its ordinary sense means only an unconditional gratuity, "presupposes a bounty", "donative" and not "compensative in its significance", it follows necessarily that the bequests to the respondents were conditional gratuities, donative and not compensatory, as we contend *infra*.

In spite of all these authorities, in the opinion of District Judge Learned Hand it is said of these bequests (R. 15):

> "If they were true legacies, he (they) would get them whether he (they) qualified or not as executors."

This is at once a statement by implication, first, that it was essential for the legatees to qualify as executors and as trustees in order to get their legacies; and second, that these "legacies" are bequests in form only, but are not such as a matter of law. We say this because heretofore bequests have been classified as absolute or conditional, vested or contingent, but never as "true" or "false," and we assume the learned District Judge did not mean to introduce a new classifica-

tion into the terminology of wills, but rather that he inaccurately expressed his real thought.

But neither assumption was correct. That it was not essential for the legatees to qualify in order to become entitled to their legacies appears *infra;* and that a bequest to one in lieu of compensation for his services, which is conditional only upon his willingness to qualify and serve if circumstances permit him to do so (see *infra*) is a "true" bequest, the cases cited plainly show.

B.

The universally accepted and judicially sanctioned meaning of the term "bequest" being a disposition by will of personal property, either absolute or conditional, the word must be deemed and must be construed to have been used in that sense in the Income Tax Law, and as there used, to include every such disposition, we repeat, for

> "It is a well settled rule of construction that language used in a statute which has a settled and well known meaning, sanctioned by judicial decision, is presumed to be used in that sense by the legislative body" (*Kepner* v. *United States* 195 U. S. 100, 124).

Not only is that presumption "resistless except against an intention imperatively clear" (*Lynch* v. *Turrish*, 247 U. S. 221, 230), but the rule is particularly applicable to the construction of the Income Tax Law in view of the fact, which, of course, Congress knew when the law was passed, that:

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to em-

brace matters not specifically pointed out" (*Gould* v. *Gould*, 245 U. S. 151, 153).

And in view of the further fact that "it would have been easy for Congress to express a purpose to tax property" acquired by bequest conditional upon the happening of any event or the performance of any act, had such a purpose existed (*United States* v. *Field*, 255 U. S. 257, 264).

The learned District Judge, in support of his opinion "that all bequests are not exempt" and so of his inferential holding that "bequest" is not used in its usual sense in the statute, said in his original opinion that if "a man agreed to leave another a legacy if he would take care of him while he lived" the legacy would be a "bequest", but that no one would suppose it would not be compensation for personal services which would be taxable (R. 14). Possibly so, but only because the testator's prior contractual obligation, discharged by the will, would be a *debt*, would be collectible even if the obligor did not provide for its payment by will, and the money or property agreed to be paid would be "acquired by contract" and not by bequest. (*Matter of Baker*, 83 App. Div. 530; aff'd 178 N. Y. 575; *Matter of Vanderbilt*, 184 App. Div. 661, 667; aff'd 226 N. Y. 638).

Appreciating the impediment of these cases to the claim that in this particular statute "bequest" was used in a qualified or limited sense, and not in its universally understood meaning, counsel for the Government invoke the rule of *noscitur a sociis* to support their contention.

That rule is not applicable in the present case.

Because the word "bequest" immediately follows the word "gift" in the statute, it is said that "bequest" should be taken to mean only an abso-

lute or unconditional bequest, or a bequest without consideration of any kind. That argument takes it for granted that every gift that is conditional, not absolute, is taxable as income—an assumption for which there no justification. But however that may be, while it is true that "the meaning of a doubtful word may be ascertained by reference to the meaning of the words associated with it" (29 *Cyc.* 1065), the rule is applicable only to determine the sense in which an ambiguous word, a word of double significance, has been used, and cannot be invoked to modify or qualify, by inference or implication only, the established general and legal meaning of a word in general use. All such words must be held to have been used in their accepted meaning unless an intention to use them in a different sense is clearly and unequivocally expressed (*Maillard* v. *Lawrence*, 16 How. at p. 261; *Kepner* v. *United States*, 195 U. S. at p. 124). Moreover, when the bill which finally became the 1913 Income Tax Law was first introduced, the clause in question read as follows: "Including the income from but not the value of property acquired by bequest, devise, or descent." Not until the bill reached the Senate was the word "gift" inserted in that clause (*Congressional Record*, Vol. 50, Pt. IV, p. 3775). Obviously, "bequest" does not "take its color" from a word that was subsequently introduced into the bill.

It was also argued in the courts below, and it may possibly be suggested on the oral argument before this Court, that the provision that income does not include the value of property acquired by bequest is a grant of an exemption or immunity, and consequently that the rule that a grant of exemption or immunity from taxation is to be construed against the taxpayer and in favor of

the Government is applicable and an authority for the narrow definition upon which the Government relies. But clearly that principle of construction has no application to the question in these cases, except, indeed, on a theory which in itself refutes the contention of the Government.

"Everything that comes in" to one is not necessarily income within the meaning of the Sixteenth Amendment (*Southern Pacific Co.* v. *Lowe*, 247 U. S. 330, 335). And the first problem that confronted Congress when it enacted the Income Tax Law was to define taxable income, to specify, to point out, what receipts should and what receipts should not be regarded as income for the purpose of taxation. It did that by providing in section II, B that "Subject only to such exemptions and deductions as are herein allowed" (and which are specified in subsequent provisions of "B" and in "C") the income of a taxable person shall include gains derived from labor (including personal service of any kind), or from capital, or from both labor and capital combined, (*Eisner* v. *Macomber*, 252 U. S. 189, 207; *Merchants' Loan & Trust Company* v. *Smietanka*, 255 U. S. 509, 517) "including the income from but not the value of property acquired by gift, bequest, devise, or descent." (See also *Gavit* v. *Irwin*, 275 Fed. Rep. 643, 646). That is, Congress, in defining taxable income, excepted from its definition (*Gould* v. *Gould*, 245 U. S. 151) legacies or bequests, for, of course, the words "but not" as used here are words of exception. (*E. H. Rollins & Sons* v. *Board of Com'rs*, 199 Fed. Rep. 71, 78, citing I Words & Phrases, p. 926; and 1 Words & Phrases, 2nd Series, p. 541). In interpreting these words of exception, the Government is not entitled to insist upon a "strict construction of

them", for as this Court said in *Eidman* v. *Martinez*, 184 U. S. 578, 583:

> "It is an old and familiar rule of the English courts, applicable to all forms of taxation, and particularly special taxes, that the sovereign is bound to express its intention to tax in clear and unambiguous language, and that a liberal construction be given to words of *exception* confining the operation of duty, *Warrington* v. *Furbor*, 8 East, 242, 247; *Williams* v. *Sangar*, 10 East, 66, 69; *Denn* v. *Diamond*, 4 B. & C. 243, 245; *Tomkins* v. *Ashby*, 6 B. & C. 541; *Doe* v. *Snaith*, 8 Bing. 146, 152; *Wroughton* v. *Turtle*, 11 M. & W. 561, 567; *Gurr* v. *Scudds*, 11 Exchq. 190, though the rule regarding *exemptions* from general laws imposing taxes may be different. *Cooley on Taxation*, 146; *In Matter of Enston*, 113 N. Y. 174, 177."

That the words "but not the value of property acquired by gift, bequest, devise or descent" are words of exception and not of exemption, and that if they are words of exemption they at once make an end of the Government's case, will appear clearly also from a momentary consideration of the meaning of "exemption" as used in tax laws.

> "The term 'exemption' presupposes a liability, and in the law of taxation it is properly applied only to a grant of immunity to persons or property which otherwise would have been liable to assessment." (37 *Cyc.* 884; *Foster* v. *City of Duluth*, 120 *Minn.* 484, 485; *Matlack* v. *Jones*, 2 Disn. (Ohio) 2, 4.)

The only gains made liable to tax being gains derived from labor or capital or both, the "presupposed liability," if any, to which the bequests

in question would be subject, were it not for the assumed "exemption clause", would arise under that part of the definition of income which provides that taxable income shall include gains derived from compensation for personal services. And it is the claim of the Government that they are taxable because they were so derived. Therefore, assuming the clause in question is an "exemption" clause, the law as applied to this case provides that taxable income shall include all gains derived from compensation for personal services *except property acquired by bequest.*

It is submitted, therefore, that the word "bequest" in the universally accepted meaning of the word, whether in common usage or the terminology of the law, includes each bequest in question, that by every applicable rule of statutory construction the word was used in that sense in the statute now before the Court, and consequently, that the moneys received by the respondents under Mr. Vanderbilt's will were expressly excepted by Congress from the statutory definition of taxable income.

POINT III.

THE LEGACIES TO THE RESPONDENTS WERE CONDITIONAL BEQUESTS. THEY WERE NOT COMPENSATION FOR PERSONAL SERVICES.

If the clause of the statute particularly discussed in the preceding point be wholly disregarded as a factor in these cases the legacies now before the Court would not have been taxable as income.

The Government claims that the giving of the

legacies to the respondents was a mere testamentary fixing by the testator of compensation to be paid to them for services actually to be performed by them as executors and trustees. And it is clear that they cannot be taxed on any other theory. This theory is untenable because the bequests were not compensatory; they were donative.

In their argument that the provisions for the legacies in question were in effect merely offers of compensation for personal services to be rendered, counsel for the Government, it is submitted, have disregarded the legal definition of "compensation"; have relied upon cases which deal with unrelated matters as if they were *in pari materia*, and have in substance contended that a testamentary direction for the payment of specific compensation to be paid only if earned, and a bequest upon condition that the beneficiary assume the executorial office if, but only if, he be able to do so, are one and the same thing. They are not one and the same thing in principle or in legal effect.

To compensate means, of course, to make a reward for, to recompense; and "compensation" as it is used in the statute means "consideration" (*Kirkwood* v. *Soto*, 87 Cal. 394, 396, 398; New Standard Dictionary).

The phrase in the statute "compensation for personal service of whatever kind and in whatever form paid" immediately follows and is intended to supplement "salaries," which latter is generally understood to refer to periodical payments made as compensation for regular employment (*Benedict* v. *United States*, 176 U. S. 357, 360; 34 *Cyc.* 1826), and "wages," which is generally applied to payment for manual labor (*Matter of Stryker*,

158 N. Y. 526). Obviously, the expression contemplates and was intended to cover payments under contracts of employment, express or implied, and was incorporated in the statute to reach all *forms* of payment for service rendered which possibly would not be included in the preceding terms of more or less limited scope.

But the fact that broad terms were used to catch every kind of service and every form of payment, does not affect the further essential factor that whatever is sought to be taxed under that phrase must be a consideration for work performed or to be performed, must "be derived from," must "proceed from," must "flow from" labor. (*Eisner* v. *Macomber*, 252 U. S. 189; *Gould* v. *Gould*, 245 U. S. 151; New Standard Dictionary).

If there ever was any doubt about this, it is settled by the judicial definition of income that is taxable under the Sixteenth Amendment and under the Income Tax Law.

As laid down by this Court, income within the purview of the Constitution, is defined to be: "* * * The gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets." *Eisner* v. *Macomber*, 252 U. S. 189, 207, citing *Stratton's Ind.* v. *Howbert*, 231 U. S. 399, 415, and *Doyle* v. *Mitchell Bros. Co.*, 247 U. S. 179, 185. See also *Gavit* v. *Irwin*, 275 Fed. Rep. 643, 645.

Therefore, in these cases, unless actual rendition of services as executors and trustees was essential to the vesting of the right of the respondents to their legacies—unless the legacies were actually derived from labor—they were not compensation for services within the meaning of the statute.

The cases cited above establish clearly enough, it would seem, that the legacies to the respondents were "acquired by bequest," and that they did not "proceed from labor."

The substance of the argument that these bequests were not "true" legacies, but were only a stipulated consideration for labor, will be found in the first paragraph of the original opinion of Judge Hand (R. 14), quoted on page sixteen of the Government's brief.

The argument is as follows: When Mr. Vanderbilt provided that the legacies should be "in lieu of all compensation or commissions" to which the legatees would otherwise be entitled, he could only have meant to substitute the legacies for their statutory compensation. "If a substitute, the legacies must themselves have been compensation, and since commissions would certainly have been for 'personal services,' the substitute itself was the same."

In short, the argument comes to this: Inasmuch as statutory commissions could have been *earned* only by the performance of executorial and trustee duties, anything given to take the place of such commissions must necessarily be so ***earned.***

Certainly it does not follow that because statutory commissions are paid as compensation for service, that everything that is given "in lieu" or "in place" of or as a substitute for commissions necessarily is given as consideration for such services. The words themselves primarily mean something different. A bequest in lieu of dower is not dower (pp. 8, 9). It is something quite different from dower. Alimony is not income, because it is not derived from the capital or labor of the recipient (*Gould* v. *Gould*, 245 U. S. 151). But income from a trust fund to be paid to the beneficiary of the trust "in lieu of alimony" is

taxable. (*Treasury Department, Cumulative Bulletin,* July, 1921, p. 190, Ruling No. 45-21-1910, O. D. 1092). If the reasoning in the opinion of the District Court be sound, trust income in lieu of alimony would be alimony and therefore not taxable.

In other words reasoning based on supposed ultimate equivalents is not sound.

So, the question whether these bequests are income (without regard to the exception clause), turns not on the fact that they were stated to be in "lieu of" or a "substitute" for commissions; but upon the question whether as a matter of law they were consideration for services to be rendered.

We submit there can be no question as a matter of settled law, that these legacies were not stipulated consideration for services.

In *Williams on Executors* (6th Am. Ed., Vol. II, 1394), in the section dealing with conditional legacies, it is stated as a general principle that *if an executor unequivocally manifests an intention to act in the executorship, that will be a performance of the condition upon which his legacy depends although he be prevented by circumstances from actually serving.*

All cases in which the question has been discussed are to the same effect.

In *Morris* v. *Kent, supra,* the court, after stating that a legacy to an executor even when expressed to be for care and pains is not to be regarded in the light of a debt, or as founded in contract, or to be governed by the principles applicable to contracts, but is a conditional legacy, further said (2 *Edw. Ch.* 179):

> "When a legacy is given to a person in the character of executor, so as to attach this implied condition to it, the question

> generally has been upon the sufficient assumption of the character to entitle the party to the same. *The cases establish the general rule that it will be a sufficient performance of the condition, if the legatee prove the Will with a bona fide intention to act under it, or unequivocally manifest an intention to act in the executorship,* as, for instance, by giving directions about the funeral of the testator, but is prevented by death from further performing the duties of his office." (Italics ours).

In *Scofield* v. *St. John*, 65 How. Pr. 292, the testatrix gave to each of her executors $1,000 "in addition to the commission or allowances they would be entitled to by law" as such executors. After the will had been offered for probate, but before it was proven, one of the executors died, and his representatives claimed and were allowed the $1,000 bequest to him. The court said (pp. 294-6):

> "The disposition of the Court is to uphold the gift, when it can be plainly seen that the legacy was not made to the executor strictly as such, though he has not acted or shown a dispositon to do so. And in the cases where the gift was not absolute, but conditional, to uphold the same, if the executor has manifested an unequivocal intention to act, and has done all that he could in the direction of accepting the office and the trusts, and has been prevented by death from fully clothing himself with all the power needed through an actual probate of the will. * * * It is urged, however, that the legacies could only be taken by such of the executors as were entitled to legal commissions, and that a failure to earn the commissions would of itself disentitle the person so failing to the legacy.
>
> I am not prepared to place so narrow a

construction upon this legacy. The gift is independent of the commission and in addition thereto. It does not necessarily follow that the condition to receiving the legacy is a lawful claim to commissions. But otherwise I conclude that an acceptance of the trust, and the performance of acts which clearly show an intention to assume all the responsibilities and duties of the office, would be sufficient to entitle the representatives of the deceased executor to the legacy, although they might not have a legal claim for commission."

In *Harrison* v. *Rowley,* 4 Ves. Jr. 212, the testatrix made a bequest to each of her executors "for his care and loss of time" in the execution of the trusts reposed in them. One of the executors survived the testatrix so short a time that he was prevented from joining with the others named as executors in proving the will, but concurred with them in giving directions for her funeral. It was held that his personal representatives were entitled to the legacy in full, the Master of the Rolls saying: "The only question is, whether this executor has demonstrably shown his intention to act in the execution of the trust."

In *Angermann* v. *Ford,* 29 Beav. 349, the testator bequeathed a legacy of £1,000 to each of his executors. One of them renounced, but subsequently, six years later, withdrew his renunciation and qualified. It was held he was entitled to his legacy, the Master of the Rolls saying that in his opinion the legatee "has fulfilled the conditions essential to entitle him to his legacy."

Lewis v. *Mathews,* L. R. 8 Eq. 277, is another case in which a like conditional legacy was held to have become absolutely vested although the legatee rendered no personal service whatever in the administration of the estate. In that case the

testator bequeathed to his executors legacies for their trouble in the execution of the trusts of his will. In a subsequent part of his will, he appointed two persons executors. One of them died during the lifetime of the testator. At the death of the testator the other person named as executor was living in Australia, where he continued to reside until his death. He never qualified as executor, but did send to England a power of attorney to another to administer the estate. It was held that he had sufficiently shown an intention to act as executor to entitle his representatives to the legacy, although he personally had done nothing more than to indicate such a purpose.

In *Brydges* v. *Wotton*, 1 Ves. & Beam. 134, a legatee who had been named as trustee and to whom had been given a legacy as a token of regard and recompense for his trouble died nineteen months after the death of the testator without having acted at all, and *he was held to have become entitled to his legacy in the absence of any refusal or neglect to act.*

Thus it is the settled rule of law that upon the strictest construction of the rights of the legatees here, subsequently named as executors and trustees, their bequests were conditional only upon their being ready and willing to assume the executorial office, provided circumstances permitted them to do so; and that to entitle them to the legacies it was not required of them that they should render services for which (in the absence of the bequests) they would have a legal claim for compensation.

Commenting upon these cases, the learned District Judge said that it seemed to him to make no difference whether the bequests in question were regarded as payable merely on condition of qualification (they might have become so with-

out qualification, it will be noted), or only for services rendered, because in either case, he said, the bequests are equally "compensation for personal services." To support that opinion he suggests the hypothetical case of a master who pays his servant in advance, trusting the servant will live to complete his services, and asks "Is the hire not a 'compensation for personal services?'" (R. 15).

The answer is obvious and supplies the test by which to settle the controversy between the Government and the respondents. In the hypothetical case stated in the opinion of the District Judge, if the servant had died before rendering any service the master could have recovered from the legal representatives of the servant, in an action for money had and received, the entire amount paid, on the ground that there had been a failure of consideration, in spite of the fact that the services were unperformed through no fault of the servant (*Bean* v. *Carleton*, 12 N. Y. Supp. 519, aff'd. 126 N. Y. 642; *Wheeler* v. *Board*, 12 Johns. 363; 27 Cyc. 855). *On the contrary, inability of a legatee to enter upon the performance of services as executor would not prevent the absolute vesting of a bequest to him "in lieu of commissions"* (*Morris* v. *Kent*, *Scofield* v. *St. John*, *Harrison* v. *Rowley*, *Angermann* v. *Ford*, *Lewis* v. *Mathews*, *Brydges* v. *Wotton*, *Waters* v. *Collins*, *Turnipseed* v. *Sirrine*, *supra*).

As we have said before, Mr. Davies, to whom a bequest of $500,000 was made by the eleventh article and who was named as executor in the sixteenth article of Mr. Vanderbilt's will, died five days before the death of Mr. Vanderbilt. Had Mr. Davies lived a week longer than he did and on his deathbed been apprised of his appointment and upon receipt of that information had

said he would serve as an executor if he should become able to do so and then had died, his legal representatives would have been entitled to the full five hundred thousand dollars. Could anyone seriously have made a claim that his estate would have been bound to pay an income tax on that money on the ground that it had been "derived from labor?"

Mr. Frederick W. Vanderbilt, Mr. Reginald C. Vanderbilt, and the respondents offered the will for probate. Had all four of them died in common disaster before the formalities of probate were completed their representatives respectively would have been legally entitled to receive from the administrators with the will annexed, $200,000, $500,000, $200,000 and $250,000 respectively. Could it then have been contended that such legacies would not have been "acquired by bequest" within the meaning of the law, or that they would have been "derived from personal service"? Surely, it never would have entered the mind of any Government official to make any such claim. And certainly the fact that they have not died and have kept faith with their testator by serving his estate does not affect either the nature of their right or their obligation under the Income Tax Law.

Of course, it is not contended by the respondents that all testamentary provisions for payments to executors and trustees are of like character. There are cases in which such provisions are not "bequests" but plainly constitute consideration for services actually to be rendered. Such are *Matter of Tilden*, 44 Hun, 441, *Richardson* v. *Richardson*, 145 App. Div. N. Y. 540, and other like cases relied on by counsel for the Government in their argument.

In *Matter of Tilden* (Government's Brief, pp.

17, 18), the testator "in lieu and exclusion of all other commissions and compensation" authorized his executors to receive from his estate, on certain sums collected by them one per cent. and on other sums five per cent. The executors received $65,000 in payment of certain United States bonds, and upon their fifth accounting had accounted therefor and been allowed one per cent. commission thereon. On their sixth accounting, they charged the estate with the difference between the one per cent. allowed and five per cent. on the same amount. The Surrogate held that they were entitled to the five per cent. and were not precluded from claiming it on the sixth accounting in spite of the fact that they had been allowed one per cent. on the fifth accounting, basing his decision upon the ground that the provision for the executors was a legacy and a legacy was not discharged until paid. The General Term agreed that the executors should have been allowed five per cent. in the first instance but held that the decree entered upon the prior accounting was conclusive against them, saying in part:

> "*The learned Surrogate has based his decision in reference to this matter upon the ground that this compensation provided for in the will in excess of that allowed by law, is looked upon as a legacy, and a legacy is not discharged until paid. But it does not seem to us that this is a correct view. The provisions in the will were intended to be as compensation for services rendered, to be in no respect a gift, but an authority to charge for their services a certain sum*" (44 Hun, 441, 444).

That provision was compensation and not a legacy because it was payable only for and in the event of performance of specified services.

The difference between such a provision and a conditional bequest in lieu of commissions is well illustrated by *Matter of Brigg*, cited by the Government in the courts below. There the testator named certain persons testamentary guardians of his children provided his wife should not survive him, and directed that each guardian should receive for such services as he might be required to render the sum of $500. The testator's wife survived him. None the less, each of the persons named as guardian claimed the $500. The claim was denied, the court saying (39 App. Div. N. Y. 485, 488):

> "*But the compensation was fixed only for such services as they might be required to perform as guardians of the estate of the two children, and not as a legacy;* and it is quite clear from those words that the testator did not intend the money should be paid to them unless they *actually performed*, in the capacity of guardians, such services as guardians would naturally be expected to perform during the minority of their wards" (Italics ours).

Richardson v. *Richardson*, 145 App. Div. N. Y. 540, (Government's Brief, pp. 18, 19), is of the same character. There a testator appointed his nephew and niece executor and executrix of his will, directed that they should hold his library in trust for a certain town, and added "my nephew and niece are to have one hundred and fifty dollars each for this work. Likewise, * * * to receive five hundred dollars each to be executor and trix of this, my last will and testament." The assets of the estate being insufficient to pay all legacies, there arose the question whether the "executors' compensation shall be paid in full or abate ratably with the legacies"—

in other words, whether the provision in question was a fixed consideration for services or a bequest. It was held that the executor and executrix, having fully performed the services stipulated in the will, were entitled to the specified compensation without reduction because the provisions for them were not legacies. The court said in part (pp. 543, 544):

> "In each legacy the testator used the words 'I give.' He does not use this term or the word 'bequeath' in directing compensation for his executors. He does not characterize it as a gift but as compensation: they 'are to have One hundred and fifty dollars each for this work * * * and to receive Five hundred dollars each to be executor and trix.' * * * As was said in *Matter of Tilden* (44 Hun, 441, 444), in which the Surrogate's Court had held that a similar compensation provided in a will in excess of that allowed by law was a legacy: 'The provisions in the will were intended to be as compensation for services rendered, to be in no respect a gift, but an authority to charge for their services a certain sum.' *The compensation provided by the will is not a legacy, and does not abate with the legacies, but is compensation carefully determined by the testator, and directed to be paid for the services to be rendered, and is, therefore, to be paid in full.*" (Italics ours.)

Matter of O'Donohue Estate, 115 N. Y. Misc. 697; *Matter of Runyon's Estate*, 125 Cal. 195; In re *Hay's Estate*, 183 Pa. 296, *John L. Batchelder, Petitioner*, 147 Mass. 465, cited on pages 20, 21, 23 and 27 of the Government's Brief, are similar cases.

Obviously, there is a broad and fundamental difference, both at law and in fact, between such

cases as *Matter of Tilden, Matter of Brigg, Richardson* v. *Richardson* and like cases on the one hand and *Morris* v. *Kent, Scofield* v. *St. John, Clayton* v. *Akin, Harrison* v. *Rowley,* and like cases on the other hand.

In each of the former class of cases, the testator himself fixes what he considers a proper charge for work to be done and directs that the amount so fixed be paid for such work. In each such case payment involves and requires actual performance of the specified services as a *quid pro quo,* and the right of the appointee is in fact contractual and based on actual service.

In each of the latter class of cases the testator in terms makes a "gift"—a "bequest." Such a gift or bequest is not, in fact or in law, a direction for the payment of a fixed compensation for services actually to be rendered, but is a donative provision, made as a mark of affection or a token of gratitude to the object of the testator's bounty, conditional only upon the legatee's willingness to qualify as executor if he be able to do so. And, therefore, the law does not impose upon the donee in any such case a contractual obligation to serve or earn as a condition precedent to the receipt of his legacy—does not apply to the determination of his right principles applicable to contracts—but deals with it in the same manner that a legacy conditional upon any other fact or act is dealt with.

Of course, it is always open to a testator to provide that the executors of his will shall not be paid the usual statutory allowances for their services; and not infrequently there has arisen the question whether or not a testator has indicated in his will an intention that his appointees should serve without such compensation. It has been

uniformly held that the making of a conditional bequest in lieu of commissions is evidence of a purpose on the part of the testator that his executor shall not receive such statutory allowances. It is true that in certain cases in which that question has arisen, the courts have not always kept clear the distinction between a testamentary offer to an executor of a specific compensation for his services and a legacy upon condition that the legatee assume the office of executor if he be able to do so. In some of the cases a bequest in lieu of commissions has been referred to as if it was at one and the same time conditional upon the legatee's willingness to serve as an executor and consideration for services actually to be rendered by him as such. (See *Renshaw* v. *Williams,* 75 Md. 498; *Sweatman's Estate,* 223 Pa. 552; *Fletcher* v. *Hurd,* 60 Hun, 576, cited on pages 21, 25, 28 of the Government's Brief.) In no such case has it been held that such a conditional bequest and such an offer of payment are of like legal nature or effect. In no one of the cases in which such provisions have at times been confused was it important whether the particular provision under consideration was one thing or the other. If it was either, it was evidence of the testator's intention that his executor should not have commissions in addition to the testamentary provision for him. That was the only question at issue, and consequently much of the language of the opinions in certain of the cases cited by counsel for the Government is *obiter dicta* and is not helpful in these cases.

In every case that we have been able to find in which there has arisen the question whether a bequest in lieu of commissions abates with other general legacies or whether a

bequest in lieu of commissions is an expense of administration of the estate, it has been held that the legacy does abate and that it is not an expense of administration. (*Waters* v. *Collins, Clayton* v. *Akin, Turnipseed* v. *Sirrine, supra*). Those cases, of course, are exactly in point, for *compensation* for services of an executor always is an ordinary expense of administration and always is payable in full, without abatement.

It is submitted, therefore, that the bequests to the respondents did not proceed from labor and were not compensation for service.

POINT IV.

IF THE BEQUESTS TO THE RESPONDENTS BE HELD TAXABLE AS INCOME, BEQUESTS AND DEVISES OF MONEY AND OTHER PROPERTY "IN LIEU OF COMMISSIONS" WILL BE SUBJECT TO DOUBLE TAXATION UNDER THE REVENUE ACT OF 1921 AND UNDER EARLIER SIMILAR LAWS, FOR MONEY AND PROPERTY SO BEQUEATHED AND DEVISED ARE TAXABLE UNDER THE ESTATE TAX LAW PROVISIONS OF THAT ACT AND UNDER THE EARLIER ESTATE TAX LAWS. CONGRESS CLEARLY DID NOT INTEND SUCH DOUBLE TAXATION.

That the distinction between a conditional bequest in lieu of commissions and a testamentary direction for the payment of specific compensation for services actually rendered by an executor is not technical only but substantial, and that recognition of it is essential to a proper administration of the present revenue act and earlier like laws, is, it is submitted, beyond question.

In the course of the debate in the Senate when

the Act of October 3, 1913, was under consideration, it was clearly indicated by Senator Williams that one of the reasons for excepting devises and bequests from taxation as income was that they were "to be reached by an inheritance and legacy tax" and that they are "reached in nearly all countries in that way." (*Congressional Record*, Vol. 50, Pt. IV, p. 3839.)

Putting aside the question whether Congress has power to impose an income tax on property "acquired by bequest," Senator Williams' statement was at once an explanation and a prophecy; for ever since September 8, 1916, all property acquired by devise or bequest has been "reached" by an Estate Tax Law.

Article I of the Revenue Act of 1921 contains the present Income Tax Law, Article IV of that Act, the present Estate Tax Law. They are companion pieces and there can be little doubt that they represent a fixed and permanent part of the policy of the Government in the matter of general taxation.

Obviously Congress did not intend to tax under the Income Tax Law property that at the same time is subject to tax under the Estate Tax Law as part of a decedent's estate. It certainly must be assumed that a legislative body does not intend to tax the same property or the same thing twice at one time under one and the same law, in the absence of so clear an expression of such a purpose that the statute cannot be construed otherwise (*Crocker* v. *Malley*, 249 U. S. 223, 233).

And yet the contention of the Government, in its last analysis, is that Congress did intend just that thing in respect of bequests like those given by Mr. Vanderbilt to the respondents.

The Estate Tax Law (Section 401) imposes a

tax upon the transfer of the *net estate* of every decedent. The tax imposed is computed at graduated rates, so much of the net estate as exceeds ten million dollars being taxed at twenty-five per cent.

It is provided in the Estate Tax Law (Section 403) that the value of the taxable net estate shall be determined by deducting from the value of the gross estate certain items. Among those deductions the only ones that could possibly be claimed to include such bequests as those in question here are: "Such amounts for * * * administration expenses * * * as are allowed by the laws of the jurisdiction, * * * under which the estate is being administered."

But that such bequests are not administration expenses has been frequently held, as we have seen. (*Waters* v. *Collins; Clayton* v. *Akin; Turnipseed* v. *Sirrine, supra.*) Therefore, they are taxable under the Estate Tax Law. If taxable as income under the Income Tax Law as well they are twice taxable under the statute at one time. Not only that but the aggregate of the taxes under the two laws might practically exhaust the whole of a residuary estate. As an illustration of this, suppose Mr. Vanderbilt had devised and bequeathed his residuary estate to his two younger sons, appointed them co-executors, with the respondents, of his will (as he probably would have done had those sons been of age), and provided that the devises and bequests to the several executors were in lieu of compensation or commissions, and then had died during the year 1921. It is not an uncommon thing for a testator to provide that the devise and bequest of his residuary estate shall be accepted in lieu of commissions. *Fletcher* v. *Hurd,* 60 Hun, 576, cited by counsel for the Government is an in-

stance. Now it is assumed by counsel for the Government, for purposes of argument, that Mr. Vanderbilt left an estate of $25,000,000. Had that been the fact his residuary estate would have amounted to about $15,000,000, as the Court will note upon an examination of his will; and on that assumption, in the supposed case the executors of Mr. Vanderbilt's will would have been required to pay out of the residuary estate an estate tax of $2,931,500, and his sons would have had to pay out of the same residuary estate income taxes of at least $8,400,000 in round figures, a total of about $11,331,000 out of $15,000,000.

Apparently appreciating that a construction of a statute that would work out any such result in any case is untenable, the Solicitor General, at the conclusion of the Government's brief, says that he does not contend that every bequest in lieu of commissions is to be treated as purely compensatory and not in part donative; expresses the view that in each case the question whether a legacy of that sort is income in whole or in part is a question of fact which must depend "to some extent upon the intention of the testator; says that opportunity was given to the respondents to show as a matter of fact that their bequests were given wholly or in part as a gratuity and not compensation; urges that it was open to them "to convince the court as a matter of fact that the *bequest* was so much greater in amount that any possible *compensation* could have been that the testator must have had in mind that a part thereof was a gift of affection and not in payment of a service" (italics ours), and concludes that as they did not undertake to do that, they have in effect admitted that the bequests were given and were accepted as compensation. (Government's Brief, pp. 34-37).

To these suggestions there are several answers:

In the first place, the substantial allegations of the amended complaints are that during the calendar year 1915 the respondents received the legacies *given* to them by Mr. Vanderbilt's will, that under the terms of the will such legacies were *in lieu* of all compensation or commissions to which the respondents would otherwise be entitled as executors or trustees and, *therefore*, were taxable income (R. 2, 3); that is, the theory of the amended complaints is, and the argument of the Government up to this time has been, that, as a matter of law, a bequest to an executor in lieu of commissions is "income." The moment it is admitted that whether such a bequest is income in whole or in part is a question of fact in each case, depending upon the testator's intention to be ascertained by evidence outside the will, the theory of the amended complaints and all preceding argument in support of them fall to the ground and the burden is on the Government to plead and prove that the particular bequests involved in these cases were wholly or to a specific amount taxable as income. It is not upon the respondents to establish affirmatively that the bequests were not so taxable.

In the second place, even if it were permissible to go outside the terms of a will to ascertain whether or not it was the intention of the testator that either the whole or a part of such a bequest should be regarded as compensation for services to be rendered, evidence of the amount of commissions or other allowances that might have been awarded to the legatee by a court had the bequest not been made, would not afford a basis for an inference as to what part of the bequest, if any, was actually intended for compensation. The theory of the Government so far has been

that in every such case the testator gave the bequest *as* compensation because he was not satisfied with the compensation allowed by the courts.

Such proof could be of value only on the assumption that the courts must hold that whenever a bequest is made to an executor in lieu of commissions, the legacy will be regarded as income up to the largest amount that could possibly have been awarded to him in an accounting proceeding had he been appointed executor and no such bequest had been made to him.

Of course, to so hold would be, in effect, to read into the Income Tax Law a provision in substance that "income does not include property acquired by bequest except that so much of a bequest in lieu of commissions as equals the statutory commissions or other allowances the executor would have received had be fully administered the estate shall be deemed to be income;" and to read into the Estate Tax Law a provision that in such case a like amount shall be deemed to be an expense of administration. If that is what is desired it must be obtained from Congress.

In the third place, under the terms of Mr. Vanderbilt's Will, construed in accordance with long settled principles of law, the whole of the legacy to each of the executors of his will became payable in the ordinary course of the administration of his estate, at one time and upon one condition. It must be dealt with as a single item. To permit extrinsic evidence of any kind to be introduced to modify or in any manner affect the settled meaning of the language of the will, to allow proof that Mr. Vanderbilt actually intended that part of his single provision for any one of his beneficiaries should be payable upon one condition and part

of it upon another, that part of it was one thing and part of it was something else, would be to re-make, not to construe his will. That cannot be done by anybody. (*Reynolds v. Robinson*, 82 N. Y. 103, 107.)

CONCLUSION.

From whatever angle the case is approached, therefore, the single question in it is whether the legacies in question were as a matter of settled law "acquired by bequest," instead of derived from labor.

We submit that the decision of the Circuit Court of Appeals that they were so acquired and its decision that they were not so derived and so were not compensation are correct, and that its judgments should be affirmed.

October 1, 1923.

Respectfully submitted,

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